No. 2311

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALASKA TREADWELL GOLD MINING COMPANY, a Corporation; ALASKA UNITED GOLD MINING COMPANY, a Corporation; ALASKA MEXICAN GOLD MINING COMPANY, a Corporation; and ROBERT A. KINZIE,

Appellants,

vs.

ALASKA GASTINEAU MINING COMPANY, a Corporation,

Appellee.

Brief of Appellee.

SHACKLEFORD & BAYLESS,
Attorneys for Appellee.

ALBERT FINK and Z. R. CHENY,
Of Counsel.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ALASKA TREADWELL GOLD MINING COMPANY, a Corporation; ALASKA UNITED GOLD MINING COMPANY, a Corporation; ALASKA MEXICAN GOLD MINING COMPANY, a Corporation; and ROBERT A. KINZIE,

Appellants,

vs.

ALASKA GASTINEAU MINING COMPANY, a Corporation,

Appellee.

Brief of Appellee.

INTRODUCTORY.

In the fall of 1909 the appellants in this case entered into a contract with the predecessor in interest of the appellee, providing for the conveyance to the appellants of a valuable water right and power plant situated at the mouth of Sheep Creek, near Juneau, Alaska. In exchange for this property the appellants agreed to furnish to the predecessor in interest of the appellee, out of a new 300 horse-power plant to be (and which was thereafter) constructed upon the property so obtained by them.

To use the words of Mr. F. W. Bradley, then the consulting engineer (now the president) of the appellants, this contract was made "for the purpose of adding value to the Sheep Creek mines" (then owned by the predecessor in interest of the appellee). (See letter from Bradley to Shackleford, Tr., page 359.)

In July, 1912, while this contract was of record, Mr. D. C. Jackling, a mining engineer of wide experience, was attracted to the property (see Tr., page 121), and upon an examination of the same it was financed and the expenditure of $4,500,000 was planned and the money raised for the development of this mine and adjoining property. A program was adopted for the purpose of driving a tunnel underneath the ore body, for increasing and multiplying the working faces in the ore body, for producing the necessary arteries and completing the necessary stopes, so that at the end of two and one-half years 6,000 tons of ore per day could be drawn from the property so developed, and poured into the rock-crushers of a 6,000-ton per day milling plant, the construction of which was to be completed at the same time, and the money was secured and an interest burden placed upon the property, dependent upon the timely completion of every detail in the underground development, so that the mill and the mine would both be ready at the same time and there would be no delay in placing the mine upon a producing basis. (See testimony of Thane, Tr., pages 120 to 125.)

Expert miners were brought out from Michigan for the purpose of expediting the work. (See Tr., page 125.)

Resting upon the assurance that the appellants would keep their contract in good faith, the Sheep Creek Mines and the contract for furnishing the 300 H. P. involved in this case were purchased by Mr. Jackling and his associates. In the community in question there was no other available power, nor

were there any producers from whom power could be obtained. (See Tr., page 265.)

As soon as the appellee got well started to work a construction of the contract in question was adopted by the appellants, which would have delayed the program of the appellee almost indefinitely. (See Tr., pages 121 to 125.) After Christmas Day, 1912, and until the Trial Court acted in the premises, the appellee was completely deprived of all power under the contract. This action on the part of the appellants seemed to have been induced by that delicate sense of hospitality which sometimes becomes apparent when a new mining concern comes into the field where an old one has been in operation for a long time before. It will be seen further on that the matters in dispute over the construction of this contract were so petty that they should have been settled out of court.

NECESSITY OF AN EARLY DECISION IN CASE AT BAR.

A decree was rendered June 12, 1913, in this cause in favor of the appellee, commanding the delivery of the 300 H. P. in question. (See Tr., pages 1092 to 1095.)

The Judge who tried this case did not grant a supersedeas from this decree, but a Judge who was unacquainted with the issues in the case subsequently granted a writ of supersedeas. (See Tr., pages 1170 to 1172.) Later the Court deeming that an emergency existed for the speedy disposition of the case, so that the appellee would not be deprived of power if they were entitled thereto during the winter of

1913, ordered that this cause be taken to the Circuit Court of Appeals for the Ninth Circuit, at Seattle, and further ordered that the record be made up with necessary speed to accomplish that purpose. The Clerk of the lower court was unable to certify the record in time to get it printed for the Seattle term, and accordingly the case was continued to the October term, 1913, at San Francisco, and set for trial on the first day of the session. (See Tr., pages 1211 and 1212.)

If the decision of the lower court is correct, the appellee in this case will be deprived by this supersedeas of a little less than a third of the power to which they are entitled during the ensuing winter, unless this case may be decided before the adjournment of the October session. During the winter months additional power cannot be obtained from any source whatever, except from the appellants, under the contract in question.

STATEMENT OF CASE.

The findings in the case state factors as they are.

Findings Nos. 1 and 2 find the corporate existence of the respective parties, appellants and appellee. The Court then proceeds to find that in the month of August, 1909, the predecessor in interest of the appellee was in possession and control of a property described in the contract hereinafter referred to, including a certain water-power plant at the mouth of Sheep Creek (see Tr., page 1055), and that the said water-power plant had installed a generating equipment for 370 H. P., in electrical apparatus and compressors. (See Tr., page 1055; also see testimony of

H. L. Wallenberg, Tr., pages 242 and 243; also testimony of H. A. Bishop, Tr., page 251.) This water-power plant had been used for the purpose of furnishing power to what is known as the Sheep Creek mines, which were claimed by the predecessor in interest of the appellee, and that the operation of the mines required not less than 260 actual H. P. in uninterrupted use, exclusive of any surges necessary to start its machinery. (See Tr., page 1055; also testimony of H. L. Wallenberg, Tr., page 243.)

Prior to August, 1909, the power plant had actually been used by predecessors of the appellee, for the purpose of operating the Sheep Creek mines, which were provided with railways, trams, compressors, lighting plant, two rock-crushers, one 30-stamp mill and other ordinary appliances used in connection with operation of mining. (See Tr., page 1056.)

(It is interesting to note that one of the pieces of machinery connected with this water-power was a duplex compressor, and that after the appellants obtained possession of this plant they moved this compressor to a tunnel on Gold Creek and tried to use 150 H. P. motor, but found the same too small to run the compressor, and ordered an induction motor of 200 H. P. to operate the compressor.) (See Tr., page 398. See, also, testimony of R. A. Kenzie, manager of appellants, Tr., page 527.)

(It is to be noted, also, that under ordinary conditions this motor would consume on the instant of starting over 400 H. P.) (Tr., page 527.)

Prior to the month of August, 1909, the predeces-

sor in interest of appellee was also in possession of a number of other mining claims, near Juneau, described in the Fifth Finding. (See Tr., page 1057.)

In the month of August, 1909, F. W. Bradley, then consulting engineer of the appellants, approached L. P. Shackleford, who was at that time the attorney for the predecessor in interest of appellee, and also attorney for the appellants, and stated that it was the desire of the appellants to secure the possession and control of said Sheep Creek power plant, and the mill sites upon which the same was situated, and construct thereon a plant of substantial size and efficiency for producing about 3,000 H. P., stating that it was the desire of the appellants to furnish to the predecessor in interest of the appellee, and its successors, sufficient power to operate the mines claimed by the predecessor in interest of the appellee, receive in exchange therefor a deed for the Sheep Creek power plant and mill sites. (See Finding 6, Tr., page 1058. See, also, testimony of L. P. Shackleford, Tr., pages 99 to 105.) At this time Mr. Bradley called the arrangement which he desired to effect for appellants, a "flood-water agreement." (See Tr., page 103.) At the same time Mr. Bradley made the statement to L. P. Shackleford that the Sheep Creek power plant had a producing capacity of 150 H. P., but that 200 H. P. would be ample with which to operate the Sheep Creek mines, and would make "good measure." (See letter of Bradley, Tr., page 108.) It is to be noted that Mr. Bradley was most seriously misinformed at the time he made this statement, for the undisputed testimony, heretofore

referred to, shows that the previous capacity of the water-power plant was 380 H. P., and that the most economical requirement of the plant was 260 H. P. (See Tr., page 243.) A draft identical with the agreement which was subsequently signed (except the agreement as originally drawn contained the words "200 H. P.," and the agreement subsequently signed contained the words "300 H. P." instead) was drawn up and transmitted, in person, through L. P. Shackleford, to the then owners of the plant in Boston, accompanied by the following letter written by F. W. Bradley:

"Treadwell, Alaska, August 10, 1909.

Henry Endicott, Esq.,
101 Tremont Street,
Boston, Mass.

Dear Sir:

We have been talking to Mr L. P. Shackleford about your water right on Sheep Creek in this district and both me and ourselves have agreed upon what we consider an extremely fair proposition our concession have been drawn upon the shape of a document which Mr. Shackleford will present to you as it is now this sheep creek water power is in jeopardy and can be taken at any time by adverse interests our proposed arrangement will preserve your rights while at the same time developing them and making the most use of them. I presume you are holding this water right for the value that it has had and may have in the future for working the sheep creek mines and thirty stamp mill connected therewith estimating conservatively 150 H. P. is all the power these

mines and mills ever required for their past operations. The mill is amply large enough for the mine and surely two hundred H. P. will more than take care of future requirements if the proposition is at all acceptable to you we would begin immediate work thereby preserving your rights and returning you some monthly income. The proposition provides ample time in which you could decide either to sell the property outright or take two hundred H. P. for the operation of the mines and mill, yours very truly,

F. W. BRADLEY."

(See, also, testimony of L. P. Shackleford, Tr., page 108. See, also, testimony of F. W. Bradley, Tr., page 652.)

Upon presentation of this letter and agreement a consultation was had with B. L. Thane, as to the amount of power needed for continuous operation, exclusive of any starting surges. It was determined by the Boston owners that they would need in continuous use 300 H. P. for the operation of the Sheep Creek mine (see testimony of L. P. Shackleford, Tr., pages 107–111 and 112. See, also, testimony of B. L. Thane, Tr., pages 117 and 118); and thereupon the following telegram was sent to F. W. Bradley:

"Boston, August 23, 1909.

F. W. Bradley,
Wardner, Idaho.

Will lease power on terms proposed subject to consent trust company if three hundred horse power is substituted for two hundred.

HENRY ENDICOTT."

And thereafter Bradley replied to said telegram as follows:

"Henry Endicott,

You may substitute three hundred for two hundred horse power may I cable Sup't Kinzie to begin immediate protection measure.

F. W. BRADLEY."

Thereafter the owners of the Sheep Creek power plant and mill sites made and executed the agreement in controversy in this case, which, omitting the signatures and acknowledgments, is in words and figures as follows, to wit:

"THIS INDENTURE AND AGREEMENT made and entered into this 14th day of October, 1909, by and between Oxford Mining Company hereinafter called the lessor and the Alaska Treadwell Gold Mining Company, the Alaska Mexican Gold Mining Company and the Alaska United Gold Mining Company hereinafter called the lessees.

WITNESSETH.

First, the lessor has this date and does by these presents lease unto the lessees all of the following described real property situated on and near Sheep Creek in the Harris Mining District, District of Alaska, to-wit:

The Mexico Mill-site U. S. Mineral Entry No. 25 lot 71 B. The Belvedere Mill-site U. S. Mineral Entry No. 25, lot 72 B. The Jumbo Mill-site U. S Mineral Entry No. 60, lot No. 260. Also that certain piece or parcel of land beginning at a stake identical with post No. 2 Jumbo Mill-site U. S.

Survey No. 260 on the meander line of Gastineau Channel; thence first course along the meander line of Gastineau Channel at ordinary high water mark N. 52° 00′ W. 54 feet to stake No. 2; thence second course N. 48 15′ E. 200 feet to stake No. 3; then S. 52.00′ E. 54 feet to the N.W. side line of Jumbo Mill-site U. S. Survey No. 260, 200 feet to stake No. 1, the place of beginning containing an area of one quarter of an acre more or less, courses expressed from the true meridian, Mag. Var. 29.30′; and also that certain water right known as the Sheep Creek Water Right and located on Sheep Creek about three quarters of a mile from its mouth, together with the flume and pipeline connecting the same with the beach near the Mill at the mouth of the said Sheep Creek, also the saw-mill, boarding-house, lumber-sheds, wharf landing, mill dam, flumes, penstocks, water-wheels, and all other machinery and appliances used in connection with said saw mill, situated near the mouth of said Sheep Creek, together with all machinery, tools, equipment, plants of every kind and description now upon said property for a term of ten (10) years from the date hereof at a monthly rental of One Hundred and Twenty-five ($125.00) Dollars per month payable in gold coin of the United States on the first day of each month during the term of said lease at the office of the lessees at Treadwell, Alaska; and it is hereby agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, that it shall be lawful for the lessor to re-enter said

premises and remove all persons therefrom, and the lessees do hereby covenant, promise and agree to pay the lessor the said rent in the manner hereinbefore specified, and not to let or underlet the whole or any part of said premises without a written consent of the lessor, not to assign this lease or any part thereof without said written consent, and at the expiration of said term the party of the second part will quit and surrender said premises in as good state and condition as the same now are.

It is the intention of the lessees to erect, equip and maintain upon said premises a water power plant of substantial size and efficiency for the generation of electric power, and if at any times after Two (2) years from the date hereof the lessor or its assigns shall elect to take a current of not to exceed three hundred (300) electric horse-power, which shall be taken from and at the generating plant to be installed upon the leased premises hereinbefore described, the lessees undertake, covenant and agree to deliver said current to the lessor or its assigns upon the execution and delivery by the lessor or its assigns to the lessee of a deed or deeds conveying said leased property herein described to the parties of the second part. If prior to the expiration of nine years from the date hereof the lessor does not elect to convey to lessees or their assigns the property herein, leased *and accept in full consideration therefor the right to the use of the three-hundred (300) electric horsepower hereinbefore mentioned,* the lessees may at their option prior to the expiration of the ten (10) years pro-

vided in this lease purchase the property herein leased absolutely from the lessor by paying to the lessor the sum of Twenty-five Thousand Dollars ($25,000) in gold coin of the United States; and the lessor covenants and agrees upon tender of said sum of Twenty-five Thousand Dollars ($25,000) to execute and deliver such deeds of conveyance to the property herein leased as hereinbefore specified, excepting only as to the title to (1) the one quarter acre tract hereinbefore described and (2) the premises occupied and used by the existing wharf of the lessor to both of which the lessor now asserts only possessory titles. The lessees may at their own cost and expense undertake to perfect the said titles and should lessee wish so to do the lessor shall lend all proper assistance in its power including the using of its name, and should the said titles be so perfected to the said premises or either of them, they shall become the property of the lessor and remain covered by this lease and subject to all the terms and conditions thereof.

The covenants herein contained shall be construed as running with the land and as a charge thereon, so that any successor or successors in interest to the lessor and or lessees who may acquire any interest in and to the titles to the said land shall be bound by this conveyance in the same manner as if they had executed this agreement; and the lessees hereof may require at their option that the property herein described be conveyed by the lessor to a responsible Trustee for the purpose of carrying out the terms of this agreement, or that

deeds and conveyances covering the property herein leased be placed in escrow so as to insure delivery of the same if required under the provisions of any of the covenants of this lease.

If neither of the options herein provided for are accepted by either the lessor or the lessees, then the property and rights herein described with all the improvements that are or that may be hereafter placed on the said premises shall be and become the property of the lessor.

The provisions herein as to the delivery of three hundred (300) horse-power at the generating plant to be installed on the premises herein described contemplates the delivery of an uninterrupted current, but the lessees shall not be liable for damages that may arise from operating and physical causes beyond its control.

IN WITNESS WHEREOF, the parties hereto have hereunto set their names and seals the day and year first above written."

(See Tr., pages 1062 to 1066.)

The Court further found (see Tr., page 1070):

From the surrounding circumstances and from the face of the contract, it was the intention of the appellants to provide, and for the predecessor in interest of the appellee to receive, the beneficial and uninterrupted use of 300 actual H. P., including such starting surges and other conditions as would reasonably insure to the Oxford Mining Company, and its successors, the right to use 300 actual H. P., in connection with the ordinary machinery used in mining, and the ordinary forms of induction motors

in common use in mining on loads of 300 H. P. or less. (See Tr., page 1070.)

The Court further found for loads of 300 H. P. or less induction motors having inherent phase displacement and power factor of less than unity were in ordinary and practical use in mining. The use of said ordinary and practical mining machinery was contemplated by the appellants at the time of the execution of this contract. The power contract was for 300 actual H. P. distinguished from 300 apparent H. P., and that the contract contemplated a beneficial use of 300 actual H. P., as ordinarily spoken of and ordinarily measured by common and ordinary instruments for the measurements of horsepower. (Tr., page 1070.)

This finding is supported, first, by the testimony of the appellants' chief electrician; second, by the testimony of R. A. Kenzie, manager of the appellant company, wherein they both testify that they have nothing but induction motors in the service of their own companies in this mining district at the present time, and that the only other kind of motors they have ordered are synchronous motors for loads of 450 H. P. or more, which have not yet been supplied. The testimony is supported, also, by the depositions given in behalf of the appellants. (See testimony of Wm. Davis, Jr., engineer for the Pacific Coast for The General Electric Company, in answer to cross-interrogatory No. 4, which is as follows:

> Q. "Where have you seen a synchronous motor in use upon a 3-phase alternating current for a load not to exceed 300 H. P.?"

A. "I have not seen more than 3 or 4 of these synchronous motors at the Schenectady works of the General Electric Company."

(See Tr., page 863.)

(See testimony of Carl E. Heise, superintendent of the Westinghouse Company, for appellants, Tr., page 933, where he says that he has never seen a synchronous motor of as small a capacity as 300 H. P. in commercial use.)

The testimony of the witnesses for the appellants on the subject was that induction motors of the type used by the appellee, and not synchronous motors, were in common, ordinary and general use for mining purposes at the time the contract was executed and ever since. (See Tr., pages 396–514 and 515.)

The Court further found that the common and ordinary instrument and device in constant and universal use for the measurement of horse-power was the wattmeter. (See Tr., page 1071.) This finding, we believe, is supported by the testimony of every witness examined in the case. (See opinion of Court, Tr., page 1204.)

(See answer to cross-interrogatory of Prof. C. L. Cory, Tr., page 826.)

(See Tr., testimony of Wm. J. Davis, Jr., page 863.)

(See testimony of A. M. Hunt, Tr., pages 897 and 898.)

(See testimony of Carl E. Heise, Tr., page 933.)

(See testimony of E. A. Quinn, Tr., page 968.)

(See testimony of E. W. Proebstill, chief electrician for appellants, Tr., page 426.)

(See testimony of W. S. Pullen, Tr., page 212.)

(See testimony of H. L. Wallenberg, Tr., page 274.)

In this connection it is to be observed, also, when the appellants started to comply with the contract in question they ordered a curve-drawing wattmeter for the switch-board, which was to make the connection for the appellee's circuit. (See Tr., pages 387 and 388.)

The Court further found that in making the contract the Oxford Mining Company relied and had a right to rely on the representation made by the appellants, to the effect that it was the purpose of the appellants to furnish the amount of power stipulated in the contract, for real, actual and working efficiency, together with such momentary surges necessary to start the machinery of the Oxford Mining Company, or its successors; and to give to the Oxford Mining Company, or its successors, the uninterrupted use of 300 real H. P., to be used in connection with ordinary motors commonly used upon loads of 300 H. P. or less, including induction motors. (See Tr., page 1071.)

The Seventh Finding is to the effect that on the 31st of October, 1910, the Oxford Mining Company elected to take the 300 H. P., and conveyed the property described in the contract, before mentioned, pursuant to the terms thereof, on the 22d of April, 1911. This finding is undisputed and supported by the allegations of the answer wherein the deed is

set forth by the appellants (see Tr., page 64), and the Court further found, from the 22d of April, 1911, until the 8th of November, 1912, the Oxford Mining Company, or any of its successors, did not receive any power contracted for from the appellants. (This latter finding is supported by the evidence to the effect that the power was not turned on until the 8th of November, 1912. No claim is made by the appellees that the power was demanded until shortly before the 8th of November, but the finding was requested and made as a showing of one of the outside equities of the case, to wit, that the appellants had had the benefit of the 300 H. P. for more than a year and a half, without paying anything therefor, and that it was therefore unequitable for them to deprive the appellee of momentary starting surges of from 5 to 30 seconds, occurring once or twice a month, the value of which—as computed by the various witnesses, on the basis of $87.00 per horse-power—would be 5¢ for each surge.)

The Ninth Finding (see Tr., page 1075) finds that the Oxford Mining Company sold its property and property rights to the appellee, which is an admitted fact.

The Ninth and Tenth Findings proceed to set forth that the appellee is engaged in developing its mines in Sheep Creek and Silver Bow Basin, both from the Sheep Creek and Silver Bow Basin side, and is pushing its development work as rapidly as possible, and the prosecution of the development work involves a speedy application of power available to the appellee company. That if the appellee is de-

prived of said power the progress will be greatly delayed, and interest burden upon its bonds and other expenses will be greatly increased; that there is no other source of power for carrying on the appellee's development work, and that damage to the appellee cannot be compensated at law. (See Tr., page 1076.)

The Court further found that arrangements for the development of the appellee mining company were made in reliance on the contract of the appellants that they were to furnish an uninterrupted current of 300 H. P. for the actual and practical use of the appellees, and that relying upon said contract the appellees engaged a force of over 175 men to perform its underground development work, at a daily expense of $750.00, and that there was outstanding some $3,500,000 bonds of the appellee, upon which interest is accumulating, and that no interest could be paid until development work of the appellee is completed; that the deprivation of the appellee of the power so contracted for would greatly delay the day when the mines of the company would become productive, and would cause the appellee company to discharge a number of its laborers; that it would be difficult to secure laborers on the resumption of appellee's work unless the same was kept up continuously. All of the above findings are fully supported by the testimony of Mr. B. L. Thane, manager of the appellee, and are uncontradicted. (See Tr., pages, 119 to 128.)

Finding Eleven (Tr., page 1077) sets forth that prior to November 12th, the appellants were notified of the assignment by the Oxford Mining Company

to the appellees, and were requested to deliver the uninterrupted current of 300 H. P. for the use of the appellees, and that prior to the 8th of November, 1911, there had been installed upon the property of the appellees, in Silver Bow Basin, at its Perseverance Mine, a 200 H. P. motor of the usual type in mining operations of like character throughout the United States and Juneau Mining District, and that the motor was connected with a compressor, and that at the Sheep Creek plant there was installed a 150 H. P. motor and 20 H. P. motor, in connection with the compressor, for the purpose of driving an adit tunnel from the Sheep Creek mines to a place underneath the Ground Hog and Perseverance Mines. (In this connection it is to be remembered that the appellees operated a small gas engine for auxiliary purposes.)

The foregoing findings are fully supported by the testimony of B. L. Thane, manager of the appellees. (See Tr., page 128. See, also, testimony of H. L. Wallenberg, engineer for appellees, Tr., page 247.) And by the admission of all of the appellants' witnesses, that at the time suit was instituted there were no motors in the Juneau Mining District excepting induction motors. That on the 8th of November, 1911, the appellants had connected their power plant with the transmission line of the appellees, and had set in their power-house an automatic circuit-breaker, which circuit-breaker was set so as to break the circuit on a maximum of 80 to 100 amperes. (This is one of the most important findings in the case, for the reason that it shows the practical construction

put upon the contract at the time the appellants first attempted to comply with it. According to the testimony of H. L. Wallenberg, the circuit-breaker of the appellants should have been set at about 80 amperes, so as to give the appellee 300 H. P., and he testified that this was the amount that could be drawn from the Sheep Creek plant when the current was originally turned on. (See Tr., page 267.) Witness Proebstill, the engineer for the appellants, testified that about the 3d of December, 1911, the circuit-breaker was set at 100 amperes, and that he proceeded to reduce the setting so that the circuit would be broken when more than 56 amperes were being drawn. He admitted that this change was made without taking the wattmeter readings on the circuit, and that this was done pursuant to orders, and that he had been instructed to construe the contract in that way. (See Tr., pages 389 to 390.) He also admitted that a wattmeter would show that under the setting of 56 amperes the appellee was getting only 210 H. P. (See Tr., page 389.) This, taken together with the fact that the appellants ordered a curve drawing wattmeter for measuring on the circuit of the appellee (see Tr., pages 387 to 388), we claim shows that the original and practical construction of the contract—by the appellants—was that the appellee was entitled to exactly the amount of power which the appellee is now claiming. The findings proceed to show that the current was used by the appellees without any difficulty, and that on the 6th of December, 1912, Proebstill, electrician for the appellants, visited the Sheep Creek power-house

and reduced the setting of the circuit-breaker to a point which would throw the same out and break the current when more than 60 amperes were being drawn through the circuit. (See Tr., page 1079.) The findings further show that the voltage of the circuit amounted to about 300 volts. The Court then finds that the circuit-breaker is not of the usual or ordinary type used upon feeders leaving a power-house, and that the usual and ordinary type of circuit-breaker placed upon feeders, leaving direct from the power-house, is what is known as a thirty-second time relay circuit-breaker, which guards against the circuit-breaker being thrown out momentarily by unavoidable surges of current. (See testimony of H. L. Wallenberg, pages 268 to 269, together with quotation from Foster's Electrical Handbook, reading as follows: "For feeders at the power stations overload inverse time element relays are desirable." See testimony B. L. Thane, Tr., pages 130 and 131.) It is interesting to note that the testimony mentioned shows that on their own line, leaving the Sheep Creek power-house, the appellants maintained a time relay circuit-breaker. (See Appellants' Exhibit No. 7, Tr., page 991.) They also maintained a wattmeter, and maintained no instrument except an instantaneous circuit-breaker and an ammeter on the appellees' line, leaving the power-house. (See Tr., page 991.)

The following witnesses also testified that a time relay circuit-breaker was the proper instrument to maintain upon the lines leaving the power-house.

(See testimony of George E. Quinnan, Operating Superintendent, Puget Sound Traction, Light & Power Company, Seattle, Washington, Tr., page 607.)

(See testimony of W. J. Grambs, Superintendent, Puget Sound Traction, Light & Power Company, Seattle, Tr., page 618.)

(See testimony of H. B. Dunn, Contracting Agent, Puget Sound Traction, Light & Power Company, Seattle, Tr., page 626.)

The Court then proceeds to find that the starting of machinery which will consume a given amount of power often causes what is known as a starting surge, which lasts from ten to thirty seconds, but from a practical standpoint is not taken into account or charged for in electrical connections, and is disregarded and provided against by the use of the ordinary type of time relay circuit-breakers. This testimony is supported by depositions of disinterested electrical experts and practical electricians as follows:

See testimony of George E. Quinnan, Tr., page 606.

See testimony of W. J. Grambs, Tr., page 617.

See testimony of H. B. Dunn, Tr., page 625. He has charge of the contracting department of the Puget Sound Traction, Light & Power Company, Seattle, Washington.

Mr. Dunn says: "In executing contracts it has been my custom to take the reading capacity of motors as a total load and allow for starting surge; I

have never executed a contract where peaks of less than three minutes have been taken in consideration in determining the load."

The Court further found, in this connection, that in the Juneau Mining District it was not customary for the appellants to charge any other customer for or disallow to them any necessary starting surges, but the power is measured under normal conditions, —that is to say, the amount of power is measured after the machinery is started and in operation. This finding is supported by the testimony of the appellants' two principal witnesses.

(See testimony of Mr. Proebstill, the Chief Electrician, Tr., page 407.)

(See testimony of Mr. R. A. Kinzie, the General Superintendent, Tr., page 536.)

Both of these gentlemen testified that no charge was made whatever for the starting surge upon the Alaska Juneau circuit; the Alaska Juneau Company being the only customer of the appellants other than appellees, and the Alaska Juneau circuit being a circuit of approximately 300 H. P. (See Tr., page 536.)

The Court further finds (see Tr., page 1981) that in establishing a circuit between the appellee and the appellants, the appellants set their instantaneous circuit-breaker upon a theoretical basis of what is known as unity power factor. The appellants have not installed a wattmeter upon the appellee's circuit, nor set the circuit-breaker upon observations taken from an ammeter and other meters, such as volt meters, at the time when the wattmeter indicates a consumption of 300 H. P.

The Court further found that there was no circuit from the power lines of appellants, either in connection with the appellee or any of their other lines, where the power factor was unity or 100%. (See testimony of appellant's engineer, Tr., page 396.)

The Court further found that at the present time there are no motors other than induction motors used in connection with the power plant of the appellants. (Tr. 413.)

The Court further found that whenever an induction motor is used the power factor is less than unity, and the actual and effective horse-power passing over any circuit, under such conditions, can only be measured by a wattmeter and the circuit-breakers set upon such circuits in accordance with observations taken from a wattmeter. (Tr., pages 396 to 421.)

The Court further found in the summer of 1912, the appellants ordered a curve-drawing wattmeter to be placed on the switch-board of the circuit between the appellees and the appellants, and that the same is in possession of the appellants, but that the appellants have not installed the same. (Tr., pages 387 to 388.)

The Court further found that the appellants refused to allow the appellee to install a wattmeter upon the panel at the power-house of the appellants, through which panel connection is made between the transmission line of the appellee and the power-house of the appellants. (Tr., pages 262 to 263.)

The Court further found that in estimating and

measuring the power used by the appellants themselves on their circuits appellants used a wattmeter. (Tr., page 238.)

The Court further found that a wattmeter is a common, ordinary and universal device used in measuring horse-power. (Tr., page 1204.) (All witnesses agree.)

The Court further found (Tr., page 1082) that it is the common practice where a certain amount of horse-power is used that the producing company allows a reasonable starting surge to the consumer, sufficient to start and put in operation machinery which will give them the current provided for. (Tr., pages 606, 617, 625, 407 and 536.)

The Court further found (Tr., page 1083) that on or about the 13th of December, 1912, after the fire at the Perseverance Mine, the current was again turned on for the operation of the machinery, at the Perseverance Mine, and the machinery continued to operate until the night of the 24th of December, when the mine was shut down for Christmas Day. Since said time the appellee has been unable to start its machinery at the Perseverance Mine with the current provided by the appellants, except under orders of the Court requiring appellants to hold in their circuit-breaker during the momentary starting surge. (Tr., pages 258 and 259.)

The Court further found (Tr., page 1084) that the appellants herein have adopted a practice whenever the instantaneous circuit-breaker is thrown out, of requiring the appellee to notify the appellants at their head office in Treadwell, Alaska, a point about

two miles distant from Sheep Creek power plant and across Gastineau Channel, an arm of the North Pacific Ocean, and that the appellants refused to allow their electrician at the Sheep Creek Power plant to restore the circuit-breaker whenever the same goes out, but required that they be notified at their head office at Treadwell, and then send a man across to replace the circuit-breaker, and that this practice deprived the appellees of an uninterrupted current of periods covering from one to eight hours.

The testimony supporting this finding was very interesting, and *develops maliciousness* on the part of the appellants in their pretended execution of this contract, which shows how irreparable the injuries are that the appellee has had to suffer. (See testimony of H. L. Wallenberg, Tr., pages 256 to 265.)

The testimony shows that a telephone connection was made, at the appellee's expense, with the Sheep Creek power plant, for the purpose of keeping in touch with the electricians in charge there for the appellants. (Tr., page 264.) But that the appellants instructed their electricians at the power plant that they were not to replace the circuit-breaker when the circuit was broken, and required of the appellee that they be informed at Treadwell, Alaska, and that at their convenience they would then send a man over to replace the circuit. The distance from Treadwell to the Sheep Creek power plant is about two miles (Tr., page 261) across Gastineau Channel, an inlet of the North Pacific Ocean, which is subject to very severe weather conditions.

The assistant superintendent of the appellants in-

formed the appellee that this was being done in order to penalize the appellees for displacing this hair-trigger circuit-breaker. (Tr., page 262.)

The chief electrician of the appellants, Mr. Proebstill, testified that anyone, even the lawyer of the appellee, was competent to replace the circuit-breaker. (Tr., page 429.) It is to be noted that all of this was done in the face of the covenant on the part of the appellants to deliver 300 H. P. in an *uninterrupted* current.

The Court further found (Tr., page 1084) that at no time since the 6th of December, 1912, except during the momentary starting surges, had the appellants furnished the appellee with as much as 300 H. P., and further found that the appellants had failed to furnish the appellee with an uninterrupted current of 300 H. P. (Tr., pages 389 to 390.)

The Court further found (Tr., page 1085) that at the time the contract of October 14th, 1909, was executed neither the Oxford Mining Company nor its predecessors in interest had any other power plant with which to connect with said current of 300 H. P., and that no other plant was in contemplation at the time, and that it was the intention of the appellants to provide for the actual and beneficial use of the current of 300 real horse-power at the power plant of the appellants. (Tr., pages 126 and 113.)

The court further found from the surrounding circumstances that the starting surge was naturally to be implied or presumed, and that without a starting surge in connection with induction motors, which the Court finds is the ordinary type in mining use for

loads of 300 H. P. or less, the practical and beneficial use of more than 100 H. P. could not have been obtained. (Tr., page 1086.) See, also, testimony of Mr. R. A. Kinzie, superintendent of appellants, Tr., page 530.)

The Court further found that under the conditions existing aforesaid, at the time the contract was executed, the parties could not have contemplated the uninterrupted delivery of 300 H. P. provided for in the contract unless a starting surge was implied in said contract. (Tr., page 245.)

The Court further found (Tr., page 1087) that an inverse time relay circuit-breaker which will resist ordinary overloads for a period of thirty seconds was the usual, practical and common device for maintaining connections upon lines leaving power-houses, and that such circuit-breaker should be installed upon the switch-board of the appellants so as to protect the appellants from short circuits, yet provide enough resistance to prevent the circuit between the appellee and the appellants from being broken under ordinary starting surges. (Tr., pages 991, 607, 618, 626.)

The above concludes the Findings of Fact entered by the Court.

The Conclusions of Law are identical with the Findings of Fact and with the decree entered herein.

Throughout the Brief of the Appellants it is insisted that the construction placed upon the contract by the lower Court enables the appellee to use unusual, improper and wasteful devices in the consumption of the power, and inferentially it is stated that this is the condition existing in the case at bar.

Such representations to this Court, whether directly or by inference, are out of all accord with the facts in the case. The undisputed testimony is that the appellee in this case is using the ordinary and usual machinery used in connection with mining operations for loads of 300 H. P. or less. In the whole record of the case there is nothing to challenge the condition of any of the machinery of the appellee, nor of any of its power lines, nor of any of its other apparatus. There is no testimony of any vicious or bad practice, or any bad state of repair in the apparatus of the appellee.

The Findings of Fact requested by the appellants in this case are found on pages 1011 to 1053. No finding was requested tending to support the theory that the appellee was not using the ordinary machinery in use for mining operations of loads of 300 H. P. or less, or that there was any evidence justifying a finding, no finding being offered that the appellee was guilty of any negligence in maintaining its power lines or other apparatus in connection with the circuit in question.

The Court then proceeded to decree (Tr., pages 1093 to 1095):

FIRST—That the appellee is entitled to the uninterrupted and beneficial use of 300 real or actual H. P., to be supplied by electric current.

SECOND—That the appellee is entitled to have and receive of the appellants all reasonable starting surges used in connection with the ordinary machinery used in mining, for the application of 300 H. P. or less, and necessary to starting of such machinery,

and the beneficial use of an uninterrupted current of 300 H P.

THIRD—That the appellee was entitled to the use of real and not apparent power, the same to be measured by wattmeter, and that the appellee is entitled to use any ordinary meters, commonly and ordinarily used in mining operations, consuming 300 H. P. or less.

FOURTH—That the appellants so set and maintain their connections, circuit-breakers and other appliances with the appellee company that the actual, uninterrupted and beneficial use of the above-mentioned rights of the appellee should not in any way be interfered with, and the appellants were enjoined from using any appliances which would deprive the appellee of the enjoyment of the rights enforced or from maintaining any circuit-breaker or other appliances which would deprive the appellee of 300 H. P. or any part thereof, to be measured by wattmeter, or which would deprive the appellee of any reasonable starting surges necessary to the enjoyment and use of 300 actual horse-power. The Court further decreed that the appellee be allowed to install upon the switch-board connection of appellee's power line with the appellant's power-house a wattmeter and other meters in such a way that the appellee may have the same under lock and key for its information and inspection, to check the meter readings of the appellants.

The Court further ordered, adjudged and decreed that the thirty-second time relay circuit-breaker be installed upon the connection between the appellee's

power line and the appellants' power-house, in such a manner as to provide reasonable starting surges in connection with the use of the appellee's machinery.

It is to be noted that there is nothing in the decree which is not the logical consequence of the findings made by the Court. It is our contention that every finding made by the Court is supported by ample testimony, and we have attempted to give the citations supporting these findings, but if the Court desires to assume the burden of receiving the testimony, we respectfully request that the testimony of Mr. B. L. Thane, Mr. H. L. Wallenberg, and the appellants' electrical engineer, Mr. D. W. Proebstill, and appellants' superintendent, Mr. R. A. Kinzie, as well as the contract and the letter from Mr. F. W. Bradley to Mr. Henry Endicott, be read through.

We submit, however, that under the ruling of this Court in the case of Thorndyke vs. Alaska Perseverance Mining Company, 164 Fed., page 657, and the cases there cited, that the findings of the lower court are conclusive, and that there is no question before the Court concerning which this Court will inquire. The testimony of the various electrical experts that the wattmeter is the only way for measuring horsepower and that the starting surges, in order to secure the beneficial use of the amount of power contracted for, are never charged for or denied to the consumer, being testimony of custom and electrical practice, does not even leave the contract open to construction on this appeal.

ARGUMENT.

Thirty-four errors are assigned—five urged.

Appellee's argument will be confined to those discussed in the opening brief.

I.

EQUITY WITHOUT JURISDICTION.

It is first said that equity is without jurisdiction for

(a) Only a breach of contract is involved.

(b) The contract is to continue indefinitely.

(c) Personal service and a high degree of skill is required.

a.

That it is merely a breach of contract is no bar to the proper exercise of equity jurisdiction. As in the case of a continuing trespass, so in face of a continuing breach of contract, equity frequently intervenes by prohibitory or mandatory injunction.

The interposition of equity to inhibit a breach of contract when the damages resulting therefrom are either inadequate or irreparable, or of such a nature as to be impossible of just computation, is almost universal.

Thus equity has intervened by injunction when the parties have entered into contracts for the assignment or use of patented articles or patented rights.

Adams vs. Messinger, 147 Mass. 185, 17 Atl. 491;
Rees' Appeal, 122 Pa. St. 392, 15 Atl. 807;
Kinsmen vs. Parkhurst, 18 How. 289, L. 385.

For the use or construction of a railway, or its right of way.

Johnson vs. St. Louis, 141 U. S. 602.

For the sale of chattels not to be obtained elsewhere.

Adams vs. Messinger, supra.

Vail vs. Osborn, 174 Pa. St. 58, 34 Atl. 315.

The general rule is well stated in Cyc.:

"The general principle applied by all the Courts is that when the breach of a contract consists in the doing of acts that a court of equity can prevent by injunction, and when it further appears that damages at law are not an adequate remedy, because the damage cannot be computed or is otherwise irreparable, such acts will be enjoined."

22 Cyc. 848.

That the damages at law are inadequate, irreparable and incapable of any just computation, will not be seriously contended.

The Court so found, and the finding is abundantly supported by the record.

A project involving an outlay of nearly five million dollars in development work, tunnels to be driven, shafts to be sunk, runways to be projected, ore to be developed and opened, mills erected, crushers, docks, railways, trams, hoists to be installed,—the whole vast enterprise planned, and proceeding along definite preconceived lines,—all to be accomplished by a given time, the progress of each particular item being interdependent upon some other, like a perfect piece of machinery, all working in harmony or not at all, that in question the only power available and relied upon by appellee, who could say with any degree of certainty, or at all,

what damages would be commensurate with the breach of this contract by appellants?

Again, it is not a total, but only a partial, breach of the contract by appellant that is complained of. Should a steam-generating plant be installed, as naively suggested in the opening brief, and an action at law instituted, appellee at the very threshold would be told that appellants had been ready and willing to furnish a certain portion of what they had agreed to furnish, and it would be insisted that appellee's measure of damages was the difference between what it was entitled to receive and what was offered.

It is submitted that if ever there was a case where equity should prohibit the continuing breach of a contract, such is the one at bar.

Finally, so far as the question of the enforceability of the contract turns upon the extent of its duration is concerned, if it were ever opened, it is now foreclosed by

Franklin Tel. Co. vs. Harrison, 145 U. S. 459, 36 L. 776.

There the telegraph company gave to appellee the privilege of putting a wire on its poles under a contract whereby, after the lapse of ten years, the wire should belong to the telegraph company, but subject to the use of appellee in the same way as before, by paying a fixed amount annually, the telegraph company obligating itself to at all times keep the wire in repair and fit for use. The contract was specifically enforced against the telegraph company, which was compelled by the decree to "maintain in good

working order a telegraph wire thereon." The Court said:

"In respect to the question discussed at bar relating to the remedy but little need be said. It is clear that appellees had no adequate remedy at law for the protection of their rights. Suits at law from time to time to recover damages for the refusal of the telegraph company to transmit the messages of appellees over this wire would not have given the relief necessary to secure their rights under the contract. Such a remedy would not be complete nor an adequate substitute for an injunction that would secure the appellees against perpetually recurring denials of their rights."

The Court cited with approval

Joy vs. St. Louis, 138 U. S. 1, 34 L. 843.

Coosaw Mining Co. vs. So. Car., 144 U. S. 550, 36 L. 537.

b.

It is next said that specific performance will not be had because appellants "will be required to perform personal services requiring a high degree of skill."

Wherein a degree of personal skill is required in the manufacture and distribution of electric horse-power is not quite observed.

In this day and generation electricity is manufactured and distributed as any other commodity.

Appellants have wholly mistaken the application of the principle.

The principle is applied to cases where the contract is personal, and a decree enforcing specific

performance would, in a certain sense, entail involuntary servitude through an extended period of time; that is to say, would compel upon the part of one party the performance of certain acts and things which could not be performed except through his individual knowledge, skill and efforts. Thus, for instance, it would not be specifically decreed that professional services be continued through a period of time; or that any given work or labor be performed by any certain person.

This principle, however, has no application to cases where the contract provides merely for the delivery of a certain commercial commodity which may be manufactured by one man or set of men as well as by another.

As well might it be said that no contract whereby an irrigation company sells land under an agreement to furnish a given amount of water therefor will be specifically enforced by the land owner because forsooth such continued furnishing involves the operation of a pump or the maintenance of dam, ditch or intake.

It is true that in Marble Co. vs. Ripley, 10 Wall. 350, cited by appellants, it was held that specific performance of a contract whereby the marble company agreed to furnish certain quantities of marble from its quarry for an indefinite term of years was not enforced.

But here the marble was to be of a prescribed size and quality and from a particular location. The decision was made to rest upon the impracticability of enforcing the decree and casting upon the Court

the burden of pronouncing upon each separate piece of marble.

And this is not all. The point was but one of many against the specific enforcement of that particular contract, and was recognized by the Court itself as not being in and of itself satisfactory. The Court said:

> "But what is a still more satisfactory reason for withholding a decree for specific performance is that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed and by the contract itself. In addition to his remedy by suit at law he has a right of entry and the privilege of supplying himself with marble, etc."

In the next case cited by appellants, *Tex. & Pac. Rwy. Co. vs. Marshall, 136 U. S. 393, 34 L. 389,* specific performance was refused expressly upon the ground of public convenience. The Court said:

> "Although the exigencies of railroad business in the State of Texas may imperatively demand that these establishments or some of them should be removed to places other than the city of Marshall, and that this would be also required by the convenience of the public, in each case both the public convenience and the best interests of the railroad company would be sacrificed by a contract which is perpetual."

The Court also found that an adequate remedy at law existed, saying:

> "It appears to us that if the city of Marshall

has under such a contract a remedy for its violation, it is much more commensurate with justice that the injury suffered by the city should be compensated by a single judgment in an action at law."

There is, of course, no similarity between compelling a railroad company to maintain, irrespective of population and the necessities of the public, its shops and offices at a given point, and compelling appellants to furnish the amount of power agreed upon.

In the next case, *Berliner Gramophone Co. vs. Seamen, 110 Fed. 30,* the contract was one containing mutual obligations which were interdependent. The Court said:

"The obligation of its covenants is interdependent; that is to say, each party is bound for his covenants if the other party performs its. The act to be done by defendant is not a single act or a series of acts to be performed at many times. Were the Court to assume supervision of this continuous contract now and enforce its performance by injunction, it must continue this supervision and see to it during the whole existence of the contract that both parties fulfill their mutual obligations. This has been repeatedly declared to be outside of the functions of a court of equity."

No such case presents itself here. There are no mutual obligations. Appellees have done everything which they are called upon to do. Nothing remains for appellants to do except furnish the

agreed upon current of electricity. One decree settles the controversy.

In the next case, *General Electric Co. vs. Westinghouse, 144 Fed. 458,* there was an adequate remedy at law; in fact, the contract itself provided the damages for its breach, Neither had any party changed position by reason thereof. The Court said:

> "There is no allegation or suggestion that either party because of the contract has abandoned any plant or sacrificed any property or put itself in any position it would not have occupied but for the agreement. The position of neither party has been changed for the worse."

In the case at bar, had appellee's grantors not conveyed their water rights, mill sites, power sites, etc., appellees could themselves generate the power appellants agreed to deliver.

In *Sewerage & Water Board vs. Howard, 175 Fed. 555,* the bill allowed "that appellant will be damaged in a definite sum by the anticipated violation of the contract," and this being the case, the Court found that upon the bill itself there was an adequate remedy at law.

In *Lone Star Salt Co. vs. Texas Railway (Texas), 90 S. W. 863,* it affirmatively appeared that all the data needed for measuring of damages resulting from breach of the contract were "easily accessible and could always be obtained."

There were also reciprocal obligations and duties. The Court said:

"Reciprocal obligations and duties are imposed for the proper and adequate performance of which on both sides the Court would have to see was specific performance decreed."

"In other words, it would be necessary not only to regulate the conduct of the defendant in furnishing tonnage, but that of plaintiff in receiving and forwarding it and in fixing its freight charges. The task thus assumed would be not merely the enforcement of plaintiff's legal duty to operate its railroad, but the enforcement also of the reciprocal obligation which it has assumed to the defendant."

"This would make it necessary that the Court look to the operation of the two businesses in connection with and with reference to each other, so that each party should be required to perform the duties and receive the benefits contracted for."

In *Pacific Electric Co. vs. Campbell Johnson (Cal.), 94 Pac. 623,* it was held merely that a Court would not specifically decree the construction and operation of a railroad. The bearing of this authority upon the case at bar is not observed.

In *Peterson vs. McDonald (Cal.), 110 Pac. 465,* not only did plaintiff have an adequate remedy at law, but specific performance would have entailed personal services.

"The effect of the decree would be to compel the performance of personal services which cannot be done."

It was on both grounds that the relief sought was denied.

That the position contended for by appellants does not meet the indorsement of the Supreme Court of California is illustrated by

Gallagher vs. Equitable Gas & Light Co., 141 Cal. 708.

There plaintiff agreed to take gas at a specified rate and defendant agreed to furnish it for an indefinite period,—"as long as plaintiff should use it." Citing with approval:

Zenia vs. Macy, 147 Ind. 568.

Whitman vs. Fuel Gas Co., 139 Pa. St. 492.

The Court said:

"In both cases there was consideration shown for the agreement to take gas and the companies agreed to furnish the gas at a rate fixed by the contract, but in neither of them did the consumer agree to take the gas for any definite period of time. There was a definite period within which the gas company agreed to supply the gas, but no express agreement that the consumer should take gas for that or any definite period.

"It was urged that specific performance could not be enforced and therefore injunction would not lie, but it was held that this contention could not be maintained. It was also held in this class of cases that there was no complete and adequate remedy at law."

No citation is given to the case of

Montgomery Light & Power Co. vs. Mont. Tr. Co., commented upon in appellants' brief.

It is next said that

Pantages vs. Grauman, 191 Fed. 318,

decided by this court in 1911 is in point.

There it was sought to specifically enforce a contract whereby defendant, among other things, agreed to furnish plaintiff for ten years, on satisfactory terms, the first call on all vaudeville acts and performances booked in San Francisco by a theater company in which he owned a majority of the stock. Obviously no Court would undertake the enforcement of a decree depending so entirely upon the good faith, skill, business sagacity, to say nothing of the judgment of one of the contracting parties. It would be objectionable, both on account of the personal service involved and the utter inability of any Court to determine with any degree of accuracy whether or not its provisions were being complied with.

Franklin Tel. Co. vs. Harrison, 145 U. S. 459, 36 L. 776.

It is next said that this case can be distinguished from that at bar.

If this be true, it is of the *utmost importance,* as it is insisted by appellees that the case is direct authority for the principle here contended for, and can be neither distinguished nor discriminated.

It is said by appellees:

1. The question of continuous performance of personal service was not considered.

2. There was no feature of personal service involved.

3. The telegraph company was a public service corporation.

1.

It is true that the question of continuous performance or personal service was not discussed, because in that case, as in the one at bar, neither the continuous performance nor the personal service is of such a nature as to come within the rule announced in *Marble Co. vs. Ripley, supra.* And this, we think, can be demonstrated.

Two of the justices who had participated in the opinion handed down in Marble Co. vs. Ripley (Mr. Justice Stephen J. Field and Mr. Justice Joseph F. Bradley) also participated in the decision rendered in Franklin vs. Harrison. It can hardly be assumed that these distinguished jurists were unaware of the principle in the announcement of which they had theretofore concurred, or of its applicability to the case then before them.

In the Franklin-Harrison case, Marble Co. vs. Ripley was before the Court on another point, and is expressly commented upon in the opinion delivered by Mr. Justice Harlan. It is inconceivable that with the very case upon which appellants rely before them, the Court and such distinguished counsel as Mr. John P. Dillon, who represented the Franklin Tel. Co., could have failed to have observed the applicability of the principle announced in the Marble case to that then being tried, if there was in fact any such applicability.

Further, there was a dissent upon another ground in Franklin vs. Harrison, and surely if Marble Co.

vs. Ripley had been applicable, it would not have escaped the notice of the dissenting justices.

It is next said there was no feature of personal service involved as there is in the present case.

In this we cannot but differ with appellants. The analogy between the two cases, we submit, is complete.

In both the duration of the contract was to be continuous and without interruption. In fact, in the "Telegraph case" it was decreed:

> "The said Franklin Telegraph Company, their successors and assigns, so long as they shall continue to maintain said line of telegraph or any telegraph line between the cities of New York and Philadelphia, do maintain in good working order a telegraph wire thereon for the use of said firm or corporation so long as the complainants, or either of them, shall be members or a member thereof, according to the terms of said contract."

In both cases certain services were to be performed in principle utterly indistinguishable. In the telegraph case it was a telegraph line. The telegraph company was

> "to keep and maintain at their own expense the said wire in good working order to and between the offices of the parties of the first part, etc., and between said offices and the place of business of the parties of the second part, etc., all expenses of batteries connected with the workings of said wire to be paid by the telegraph company."

Also:

> "In case the said wire shall at any time be out

of order or incapable for any cause of being used, the parties of the first part (the Telegraph Company) will transmit the messages of the party of the second part, etc., free of all charge and expense."

Not only must this service be maintained for the parties with whom the contract was made, but also for *four of their licensees.*

In the case at bar all that is required of appellants is to furnish from a plant from which they are generating electricity for their own use a certain stipulated amount for the use of appellees.

If there is any difference in principle between the service required to maintain a telephone line, batteries, connections, etc., and that required to furnish electric power, it is not quite observed.

3.

It is next said that the case is distinguishable, for that the telegraph company was a public service corporation.

In reply to this, suffice it to say that there is not a single line or word of the opinion in the "Telegraph Case" which would indicate that this factor in the remotest manner entered into the decision.

It is therefore respectfully submitted that the Franklin case is an authority directly in point, cannot be distinguished or discriminated, and should foreclose the discussion.

This, however, is by no means the only decision to be found in the books analogous to the case at bar.

Passing by the cases of

Henricks vs. Hughes (Ala.), So. 637,

Joy vs. St. Louis, 130 U. S. 1,

Union Pac. Rwy. Co. vs. Pacific Rwy., 163 U. S. 564.

commented upon in the appellant's brief, and all more or less authority to sustain the contention of appellees, we respectfully invite the Court's attention to

So. Ala. Rwy. vs. Highland, 98 Ala. 407, 13 So. 684.

where a contract to maintain railway crossings was specifically enforced.

Schmidt vs. Marble Co., 101, 478, 41 S. W. 1024,

enforcing specifically a contract to operate a street railway for thirty years.

Bailey vs. Collins, 59 N. H. 462,

enforcing a contract to refrain from manufacturing certain leather articles.

Hackett vs. Hackett (N. H)., Atl. 434,

enforcing an agreement to provide for the beneficiary during his life.

Chubb vs. Peckham, 13 N. J. Eq. 207,

enforcing a contract against children to provide for their parents comfortable support and maintenance suitable to their condition wherever they or either of them might choose to reside.

St. Regis Paper Co. vs. Santa Clara L. Co. (N. Y. 1903), 65 N. E. 967,

holding that:

"Where a vendor refuses to perform a contract under which the vendee is entitled to a designated

quantity of pulp wood yearly for a certain period of years from designated premises, the remedy of the vendor at law is inadequate where the future price of the wood and the cost of obtaining it is uncertain, and where the possibilities of the destruction of the timber by fire or the taking of the land by the State in the exercise of eminent domain prevent an accurate computation of the damages." The Court said:

"The time over which a contract extends is not necessarily controlling as to specific performance."

Whatever the law, as intimated by some of the authorities, may have been twenty years ago, it does not now sustain appellants' position.

As well expressed by Prof. Pomeroy in his article upon the subject in Cyc.

"But in a remarkable series of cases, beginning with the year 1890, contracts involving the operation of railways, often of the utmost complexity, and extending over a long term of years, or perpetually, have been enforced specifically. In the leading case of the series the controlling reason for the decision was that the interests of the general public would have been injuriously affected by a failure to make the decree, but this reason appears to have been dropped *out of sight in the cases following this precedent.*"

36 Cyc. 587.

In *Texas Co. vs. Central Fuel Oil Co.,* 194 Fed. 1, decided by the Circuit Court of Appeals for the 8th

Circuit as late as February 13, 1912, there was a specific enforcement of a contract by which defendants agreed to deliver the oil produced from wells operated by them into the pipe-lines of complainant extending to such wells.

Almost every phase of the question is here examined and all the learning upon the subject carefully reviewed. Among other pertinent things the Court said:

> "It is now well settled that when the chattels are such that they are not obtainable in the market, or can only be obtained at great expense and inconvenience and the failure to obtain them causes a loss which could not be adequately compensated in an action at law, a court of equity will decree specific performance."

Examining the contention that equity would not intervene where the contract extended over a period of years necessitating supervision by the Court in the enforcement of its decree, after reviewing all the leading cases on the subject the Court said:

> "While it is true, as contended by counsel for appellees, that these cases relate to contracts between railroads and therefore might have been sustained upon the ground of the interests of the public, there are other cases in no ways affected by public exigency, especially where violations of the decree could only occur infrequently, and each violation would be a single, complete act."

It is believed that this case, like that of Telegraph Co. vs. Harrison, is directly in point, and cannot be distinguished.

But even had there never been written a line of law upon the subject, a mere statement of appellant's position would seem to amply refute it.

We were the owners of a valuable water right on Sheep Creek. We had been generating electric power. We had a generating plant, mill sites, machinery, etc. The appellants desired to develop a greater power than we were developing, to the end that it might use the excess on its own mines. It said to us: "If you will deed us your generating plant, your water right, your mill sites, we will furnish you with 300 horse-power." We deeded, in pursuance of this offer and contract, and now appellants, without offering to return us our property, says we are not entitled to have our horse-power, because, forsooth, the contract is a continuing one and some service will be required of it in the execution thereof, at the same time taking all our power for itself.

The wonder is, that counsel so learned and so distinguished in the law would pause sufficiently long to seriously urge to this Court a proposition so utterly conscienceless on its face.

II.

ORAL TESTIMONY.

It is next said that the Court erred in permitting testimony tending to ascertain the meaning of the contract.

This, of course, depends on whether or not the contract was ambiguous. If not, the testimony was, of course, inadmissible. If so, all will agree that it was properly received.

That the contract is in fact ambiguous in its terms is apparent from its mere reading, when the contention of the parties in this suit is borne in mind.

On the other hand, it is affirmed that by the expressions:

"A current not to exceed 300 electric horse-power";

"The 300 electric horse-power hereinbefore mentioned";

"300 horse-power at the generating plant"; is meant a current of electricity from which it might be theoretically possible, by the use of the most delicate and inappropriate machinery, to develop approximately 300 horse-power.

On the other hand, it is maintained that the expressions are controlled by the words "300 horse-power," and that what is meant is 300 actual, as opposed to theoretic or apparent, horse-power.

It will at once be observed that from the terms of the contract itself it would be impossible for either Court or layman to say which of these contentions should be sustained.

The terms themselves are equally susceptible of either construction.

Under these circumstances the testimony introduced to show the surrounding circumstances of the parties at the time of the execution of the contract in question was properly admitted. The only two questions involved in the construction of the contract of October 14th, 1909, under the pleadings in this case are:

FIRST.—The question as to whether the appellees

were entitled to wattmeter measurement of their power and whether real or apparent power was intended in the contract.

SECOND.—As to whether the appellee was entitled to such reasonable starting surges as were necessary to the enjoyment and beneficial use of the power contracted for between the parties to the contract. *Neither one of these rights were specifically granted or denied by the contract of October 14th, 1909.*

It would be a waste of time after this observation to argue to the Court that the Court had no right to go into surrounding circumstances of the parties to determine their intentions concerning matters which were not definitely expressed in the contract. The citations of the hundreds of authorities which allow the Court to look into the surrounding circumstances would be a tax, under the circumstances, upon the patience of the Court, we assume, and we therefore omit such citations.

III.

EXPERT TESTIMONY.

It is next complained that the Court erred in refusing to permit the witness Proebstill to explain the meaning of the words "current not to exceed 300 electric horse-power."

This position is not sustained by the record.

The controversy arose in the following manner:

Witness' attention was called to the contract and counsel said: "The language of the contract in that connection is as follows: 'Shall elect to take a current of not to exceed 300 electric horse-power which

shall be taken from and at the generating plant to be installed.' What does that mean?"

Objection to this was sustained. The ruling was clearly correct. The question involved, not the meaning of the terms, but the construction of the contract. The Court said:

> "I wish the witness might answer; that would save my doing so. He can explain the terms but not explain the contract." (Tr. 364.)

Thereafter, and beginning at page 368, the witness was permitted to fully explain all the technical terms.

Not only was this witness permitted to explain the meaning of all the terms used, but the greatest latitude in this respect was given to all the other witnesses produced by appellants.

IV.

THE GILBERT CONTRACT.

It is next said that the Court erred in refusing to permit witness Kinzie to testify to facts which would show noncompliance on the part of the appellee and its predecessors in interest with the terms of the contract sued upon.

We think this contention merits little consideration. Neither is it sustained by the record. No noncompliance was plead by defendants, appellants here, in their answer. It was not an issue in the case; and as to offering to amend, no amended pleading whatsoever was tendered. It was not even stated in what respect it was desired to amend.

Further than this, the record clearly discloses that appellees, plaintiffs below, had fully complied with

the contract upon their part, and had actually, in pursuance of its terms, deeded to appellants all the property and rights therein specified.

Nothing else was left for appellees to do. The contract upon its part had been fully performed long prior to the institution of the litigation.

If, as intimated in another portion of the brief, the complaint upon this point is predicated upon the refusal of the Court to permit any inquiry into the so-called Gilbert contract, it is hard to conceive upon what ground the ruling can be attacked.

Assuming that the Gilbert contract did in fact cast some kind of a cloud upon appellants' title, there is not a scintilla of testimony in the record that appellants then or at any other time ever requested appellees to quitclaim or otherwise remove such cloud.

And further, it affirmatively appears that appellants in fact accepted an indemnity agreement, executed on the same day as the deed, thereby waiving any claim it might otherwise have had.

And lastly, it is a little too much to say that appellants were justified in refusing to give to appellees that which they had agreed to give, because, forsooth, some third party had asserted some vague, indeterminable claim thereto.

V.

REAL NOT THEORETICAL POWER.

It is next said that the Court erred in finding and holding that the contract meant real as distinguished from theoretical or apparent horse-power.

Other than the mere assertion that this is what the contract means, and the testimony of experts to

the same effect,—*the very matter to be determined*—we have searched in vain through appellants' brief for any fortifying argument. No reason, either in logic or fact, is brought forward. It is merely said that the phrase necessarily means this and cannot mean anything else.

Appellants say that the thing agreed to be delivered was current, not developed, power. Therefore, any current from which the power might be developed, no matter how costly or unusual the machinery, would fulfill the terms of the contract.

Appellants' premises may be admitted, but its conclusion by no means follows. Certainly no one contends that anything was to be delivered other than current, but the question still remains open as to the quantity or volume of that current. Was it to be such as, with the use of costly, intricate and unusual machinery, might be theoretically capable of developing the specified amount of power, or was it that current which, with the use of unusual, ordinary and appropriate machinery, *was* capable of producing a like amount?

As to the testimony of the experts, it rests upon a false analogy. Because, it is said, in rule 74–A of the Standardization Rules of the American Institute of Electrical Engineers, that if an apparatus is rated at a certain number of kilowatts without specification as to the power factor, a power factor of 100% or unity will be presumed, therefore, in a contract in which no power factor is mentioned, one of 100% or unity will also be presumed.

Of course, the American Institute of Electrical

Engineers, eminent though it be, is not a legislative assembly, and cannot by rule establish any ultimatum for the construction of contracts. Neither does it at all follow that because one rule is adopted by electrical experts in the rating of machinery, a similar rule universally prevails in the construction of contracts.

In fact, the law is quite to the contrary, and where words or expressions have a technical as well as a popular meaning, the rule is that the popular meaning is to be preferred unless it clearly appears that the term was used in its technical sense.

> "In construing a written contract, the words used should be taken in the ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense."
>
> *9 Cyc. 578.*

Of course, the term *"a current of not to exceed 300 electric horse-power"* is not necessarily technical, and to the average layman, at least, means a current which generates 300 horse-power by *the usual and ordinary methods.*

It would be amply sufficient in reply to assert the opposite of the contention of appellants and call attention to the fact that the question being one of intention, that is, a question purely of fact, and having been determined adversely to appellants on *abundantly sustaining testimony,* is here foreclosed under the well-settled rule in this jurisdiction that where a question of fact has been determined by a *nisi prius* court, it will not be by this court disturbed,

unless clearly erroneous. (164 Fed. 657.)

We are, however, by no means averse to a re-examination of this question of fact by this court, if the Court wishes to assume this additional burden.

What, then, was the intention of the parties at the time of the execution of the contract, and first—as to the situation of the parties at this time?

Wallenberg (Tr. 242) and Bishop (Tr. 253) both testified, and their testimony stands uncontradicted, that at the time of the execution of the contract and prior thereto, appellees' predecessors in interest had an installed equipment of *380 horse-power.*

One Beach Cylinder Compressor of 100 horse-power.

One Duplex Compressor of 165 horse-power.

One Multiple Westinghouse Compressor of 80 horse-power.

Another generator of 25 horse-power.

They further testified that the actual requirements of the mine as it then stood amounted to 261 horse-power. Appellants were desirous of obtaining the water right from which this power was generated, as well as certain mill sites and personal property specified in the contract and deed of conveyance.

They approached appellees' grantor through their own attorney, who was also at the time the attorney for the other contracting parties.

Their first offer was a current of not to exceed 200 electric horse-power. This offer was declined.

A consultation was held by appellees' grantor with Mr. B. L. Thane, who advised them that in his opinion *200 horse-power would be insufficient,* and that their requirements would need at least *300 horse-power.* Is it conceivable that when they eventually agreed to accept 300 instead of 200 horse-power they meant theoretical or apparent and not actual horse-power? Their Beach Cylinder Compressor and Duplex Compressor alone required 256 horse-power, and it can hardly be imagined that in contracting for 300 they were aware that they were in fact contracting for 210.

It would therefore seem only reasonable to presume that so far at least as appellees' grantor is concerned, it thought at the time of the execution of the contract that it was to receive a current from which 300 actual horse-power could be generated by the use of *the usual, ordinary and appropriate machinery.*

The other party to the contract, appellants, was represented by Mr. F. W. Bradley. Mr. Bradley himself admits that he did not use the term "a current of not to exceed 300 electric horse-power" in any technical sense. In his deposition he said: "In drawing up the contract, *neither Mr. Shackleford nor myself being electrical experts, we avoided the terms of the usual power contract, etc.*" (Tr. 684.)

Not only this, but in his letter to Mr. Henry Endicott (Tr. 652), which Mr. Shackleford took east with him at the time of the presentation of the original contract, he said:

"The mill is amply large enough for the mine, and surely *200 H. P.* will more than take care of future requirements. The proposition provides ample time in which you could decide either to sell the property outright or take *200 horse-power* for the operation of the mines and the mill."

It will be observed that not one word is here said of current, etc.

Can it be conceived that Mr. Bradley, by the use of this language, meant anything but actual as opposed to theoretical horse-power? He was dealing with people whom he knew had no experience in such matters and were without any technical or mechanical learning. Can it be that he intended other than 200 horse-power as popularly and generally understood; that is to say, that amount of current which would produce that power in the usual, ordinary and customary manner with the use of the usual, ordinary and *appropriate machinery?*

To hold otherwise we think would be to do Mr. Bradley a very serious personal injustice, for it would place him in the unenviable position of securing by artifice and through the ignorance of the gentlemen with whom he was dealing that which he could not otherwise have obtained.

But even were this the case, it would not, and could not, affect the construction which under well-settled rules of law the Court must place upon this contract.

"Language must be interpreted in the sense in which the promisor knew or had reason to know that the promissee understood it."

9 Cyc. 587.

So that, no matter what secret intention existed in the mind of Mr. Bradley, if any such intention in fact did exist, he at least knew that when he eventually promised to deliver 300 horse-power instead of 200 horse-power, his promisee would believe that this was a current which would in fact produce that much power by the use of the usual, ordinary and appropriate motors, and not one which would produce only 210 horse-power except by the use of more costly, intricate and unsuitable apparatus.

We are unmindful of the fact that Mr. Bradley now contends that he at all times intended the contrary, but the most casual glance at his deposition will indicate that he has become so much of an advocate in the case as to render his present recollections of his then intentions subject to a considerable amount of very just suspicion.

In any event, his secret intentions form no part of the proper construction of the contract.

Again, it is to be remembered that it was appellants' contract.

> "It is a well-settled rule of construction that words will be construed most strongly against the party who uses them, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."
>
> *9 Cyc. 590.*

In *Noonan vs. Bradley, 9 Wall. 394, 19 L. 751,* it is said:

> "A party who takes an agreement prepared by another and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him."

This is precisely what happened in the case at bar. The contract was prepared by Mr. Shackleford under the direction of Mr. Bradley. It was transmitted to appellees' grantor through Mr. Shackleford, accompanied by a letter from Mr. Bradley addressed to Mr. Endicott, in which the contract as thus prepared was formally tendered in the following language:

> "Our conclusions have been drawn up in the shape of a document which Mr. Shackleford will present to you."

It is true that Mr. Bradley speaks in the letter of having made an agreement with Mr. Shackleford, as the representative of appellees' grantor, but the record utterly fails to disclose any authority upon the part of Mr. Shackleford to represent appellees' grantor, he being merely their attorney at law as well as the attorney at law for appellants.

The contract thus tendered, therefore, becomes the contract of appellants.

It was prepared by them, and upon its faith and credit as so prepared and tendered appellees' grantor, without further change than the mere insertion of 300 instead of 200 horse-power, parted with its property.

Under the rules above quoted, if there be ambig-

uity, the decision must, as a matter of law, be against appellants.

> "If the contract is as contended for, it would impeach the good faith and fair dealings of the Insurance Company, for it would be deceptive and calculated to mislead those who are not well informed on matters of this kind."
>
> *Phoenix Ins. Co. vs. Slaughter, 10 Wall. 404, 20 L. 445.*

Under this well-settled rule of construction the decision must be with appellees, for, as has been pointed out, there can be no doubt that at the time of the execution of the contract, its grantor believed it was to receive a current from which it could develop 300 actual horse-power by the use of the usual, ordinary and appropriate machinery.

In view of this consideration, any other construction would be to impute the good faith of appellants in their dealings with persons "not well informed on matters of this kind."

Again, it is a well-established canon that where the meaning of a contract is doubtful, that construction will be adopted which will do equity.

As said by the Supreme Court in Noonan vs. Bradley, *supra.*

> "When an instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

Again, as was well said by the Circuit Court of Appeals for the 8th Circuit in

Leschen vs. Mayflower, 173 Fed. 855,

a decision in which Mr. Justice Vendevater, then Circuit Judge, participated:

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable contract."

To the same effect is

Barnsdall Oil Co. vs. Leahy, 195 Fed. 732,

from the same Circuit Court of Appeals, where it is said:

> "Where the language of a contract is contradictory, obscure or ambiguous, or its meaning is doubtful, so that the agreement is fairly susceptible of two constructions, the more natural, probable and reasonable interpretation should be adopted."

When it is remembered that on the one hand Mr. Bradley would have been more than willing to sign an agreement giving 300 actual as distinguished from apparent horse-power, while, on the other hand, appellees' grantor would, in accepting 210 horse-power, have been giving up almost one-third of what it then had, it would seem that the case at bar brings itself directly within the rule above stated.

Appellants in this case request the Court to construe the contract so that it will be announced that it was the mutual intention of the parties, including the predecessor in interest of the appellees, to abandon a water right which was capable of producing 380 horse-power and take in exchange therefor a contract which by the use of ordinary and practical machinery would only bring to them 100 horse-power, in the event the surge be not implied.

Acting upon the assumption that Mr. Henry Endicott and his associates were prudent and reasonable men, is it possible to assume that the contract was signed with the intention of donating to the appellants two-thirds of the value of the water right transferred, to say nothing of the other property which passed by the conveyance?

But beyond all this, by far the safest method of determining the real intention of the parties is to adopt that construction which the parties themselves placed upon the contract by their acts prior to the occurrence of any difficulty.

The record in this case stands uncontradicted that after appellants had been notified of the assignment to appellees of its rights under the contract, and before any controversy had arisen appellants so adjusted their circuit-breaker upon the transmission line as to give to appellees not only the full 300 actual horse-power specified in the contract, but a sufficient starting surge as well.

They had a time relay circuit-breaker not in use. It was not adjusted, because the instantaneous circuit-breaker was so arranged as to afford ample cur-

rent without interruption. They ordered a curve-drawing wattmeter for appellee's panel, and the situation thus stood from the 8th of November, when appellee first began to take the current, until the 6th of December, when Mr. Proebstil, acting under orders from his superiors, so readjusted the circuit-breaker as to render any current in excess of 210 horse-power unavailable.

It is inconceivable that appellants would have so acted if their then construction of the contract was what they now contend for.

Finally, on this point it is submitted that the decision should rest with appellee, for, as has been pointed out, the question, in any event, is one of of fact found by the Trial Court against appellants on abundantly sustaining testimony and in accordance with every sound canon of construction.

VI.

SURGES.

It is next said that the court erred in finding and holding that under the contract appellee was entitled to such reasonable surge as might be necessary to start this machinery. The testimony shows that the contract was a flood-water contract (Bradley, Tr. 678); that the question as to the actual necessity of a starting surge was not discussed at the time of its execution.

The contract was sent east with the representation that it was intended to insure to the owners of the Sheep Creek mines sufficient power for their operations.

Great stress is laid by appellants upon the expres-

sion "not to exceed 300 horse-power." The contention might be meritorious if the contract did not show that it was the intention of the parties to deliver an uninterrupted current of 300 horse-power.

As said before, the contract was intended as a flood-water agreement so far as appellants were concerned. Appellee's grantor was in possession of a power plant which, according to the undisputed evidence, had a producing capacity of 380 horse-power real. (Tr. 530.)

In effect, Mr. Bradley said about as follows:

> "You are at the lower end of the creek. I am desirous of developing more power than is necessary for you. If you will vacate the creek so I can accomplish this, I will double the head and preserve your status to the end that as long as this creek can produce the amount which is necessary to your consumption, you shall have it from my plant."

This was the purpose of the contract. The contract having been executed, and appellee's grantor having conveyed all its property rights, Mr. Bradley in effect now says:

> "We admit, when you had your plant which we have taken from you, you could have started any of the machinery in question and operated the same, but because the contract which we executed says 'not to exceed 300 horse-power,' you are in a far different position than before you deeded the property to us, and under ordinary conditions you may get only a third of the power you used to get."

The words "not to exceed 300 horse-power" were properly put in the contract for the protection of appellants and not for the purpose of defrauding appellees. If the contract had contained an absolute covenant to deliver 300 horse-power, a hardship might have been worked upon appellants. Under extreme circumstances the water of Sheep Creek might become insufficient to generate 300 horse-power; there was no intention to exact of appellants more power than the waters were capable of generating.

Appellants' theory that the starting surge may be denied appellee is based upon a mechanical fallacy so apparent as to seem little worthy of comment.

It stands admitted by practically every witness that the surge is in no sense necessary, but is due entirely to a condition existing in the generating plant of appellants.

It stands undenied that a generator of 300 horse-power operating as a separate unit will start and operate a motor of the type used by appellee and bring it up to its load without the assistance of any other unit of generation.

Furthermore, the testimony shows that the high voltage which is artificially maintained in the generating plant is not at all necessary to the starting surge; that is to say, when an increase in amperage is necessary to start the machinery, a corresponding decrease in voltage occurs, without entailing any difficulty to the consumer. (Tr. 247.)

The high voltage maintained by appellants becomes necessary only after the inertia of the consuming

machinery is overcome and speed is desired.

It stands undisputed that when the Sheep Creek plant has produced only 500 horse-power, the machinery of appellee was started without difficulty.

It is an admitted fact in the case, unchallenged by any testimony to the contrary, that appellee's machinery was started by means of a gas engine incapable of developing over 245 horse-power (Tr. 249). How is it, then, that so much excess power is required from appellants' generator? The answer is obvious. The power is not necessary to the starting of appellee's machinery, but is consumed merely because it is there and because there is at present no known means of preventing its sudden rush through the circuit at the instant of overcoming the inertia.

The situation may be illustrated by the case of a boy and a man cranking an automobile. The boy with a limited amount of strength can just set the machinery in motion. The man, having two or three times his strength, starts the same machinery, and yet, ordinarily in starting, the power used by the man greatly exceeds that used by the boy. The reason is that, when the demand is made, the man will respond with greater strength than the boy. The excess of power is used, not because it is at all necessary, but because it simply happens to be there.

So, when a large generating plant, having in reserve a much greater amount of current than is necessary to start a given piece of machinery, is called upon to overcome the inertia, in that instant of time when the circuit is first thrown in, much more will be delivered than is at all necessary.

As in the case of the man and boy, it is because it is there, and not because it is necessary.

The greater the supply of power in reserve, the greater will be that consumed in the starting surge; the less power in reserve, the less will be consumed.

This accounts for the great variance in the amount consumed, sometimes only 50 per cent more than that used in operation, and sometimes 900 per cent more.

Thus, if appellants were at any given time using virtually all of the current which they were generating, a much less amount would be required in starting appellee's machinery than if at the precise moment appellants were using more of the current then being generated.

Thus, it appears that the fact that more power is consumed by appellee in the starting of its machinery than is required is not in any sense the fault of appellee, and results from the inability of appellants to prevent a greater momentary inrush of their current than is required.

It is for this reason that, as testified to by many of the witnesses and found by the Court, in commercial dealings, no account is taken of these surges. They being wholly unnecessary to the consumer and beyond the power of the generator to prevent, it would be obviously unfair to tax to the former.

But even if the case were different, and an excess of power over and above that required for operation was necessary to effect the starting of usual and ordinary machinery necessary to the adequate enjoyment of the current granted in the contract, nevertheless,

appellants would, under the contract, be obligated to furnish this excess, whatever it might happen to be, upon the well-known principle that where a thing is granted, that which is essential to its enjoyment passes with the thing itself.

If A granted to B a parcel of land in the midst of land owned by A, a right of way over the lands of A passes to B with the grant of the parcel itself. *It is ex necessitate.*

In this connection we desire to quote the very appropriate language of the Supreme Court of West Virginia in the case of Uhl vs. Ohio River R. R. Co., 34 S. E. 943. In speaking of easements of necessity:

> "The implication of necessity is a mere fiction of the law for public policy to secure to the owner the full enjoyment of his estate in a grant of reservation, which he would be otherwise entirely deprived of by the pure obstinancy of his grantee. This is plainly a case of dog in the manger, what he cannot eat he will not let others eat, It is certainly a matter of gratification that the law permits the polite removal of the obstruction."

A moment's consideration of the matter will demonstrate how utterly unfair any rule would prove in its operative effect.

Assume in the case at bar that the 900 per cent excess of power testified to by some of the witnesses as sometimes consumed in overcoming the inertia of machinery was necessary to start that of appellee; that is to say, assume that in order to start its machinery appellee must have a current nine times more potential than that required for operation, the

result would be that under appellants' alleged conception of the contract, appellee's available power would be only 33⅓ horse-power, because as it required nine times this amount to start its machinery, that is, 300 horse-power, and as the contract limited the amount to which appellee could in any event be entitled to 300 horse-power, it must necessarily follow that appellee must confine its operations to machinery consuming in operation not over 33⅓ horse-power.

Thus, though in terms appellee had been granted 300 horse-power, it would find itself in effect the possessor of but 33⅓.

DECREE.

Confined to no one place, but scattered rather through the whole of appellants' brief, is to be found the very deepest pessimism as to the operative effect of the decree rendered herein.

We cannot help but feel that an examination of these dismal and gloomy forebodings will show them fanciful rather than real.

Appellants object to the wattmeter.

In limine let it be said that they themselves had already ordered one which, before they conceived the plan of cutting appellee's power from 300 to 210 horse-power, they had intended to place at the precise spot where they are now directed by the Court to make the installation.

In view of this consideration, how it now operates as a hardship is not observed.

Why did the Court order the installation of this so much objected to wattmeter?

Through all commercial transactions from time to time there arises a dispute as to the system of weighing or measuring a commodity contracted for. But very often, we regret to say, when a person purchases anything which cannot be all delivered at the same time, and the vendor has received the entire consideration therefor, the latter commences to cast about for some method of delivering the commodity in a depreciated weight or measure.

There is sometimes, for scientific and other purposes, a refined system of measurements, but there is always a practical system, measuring the thing according to its useful and commercial value, and not according to theory.

To the ordinary layman, particularly when the contract is not drawn in scientific terms,—and it is admitted by Mr. Bradley that the contract in question was not so drawn (Tr. 684)—the thing is not in the theoretical potentiality of a certain quantity, but the actual, useful potency of that quantity. Neither the Endicotts nor Hackett were electricians. The contract was the contract of a layman.

The testimony throughout the entire record discloses that the induction motors are the only motors commonly and ordinarily used for mining purposes. Even appellants'. superintendent and chief electrician so testified (Tr. 334–396).

When Mr. Bradley wrote his letter to Mr. Endicott and forwarded draft of the contract, it is clear that he was referring to power in the sense of what work it would perform, and it was in this sense that his letter and contract were received.

At the time he wrote his letter to Prof. Cory, October, 1910 (Tr. 732), he made no claim that the contract referred to anything but actual horse-power.

After appellants were notified that appellee was desirous of receiving the power, appellants purchased a curve-drawing wattmeter for the purpose of placing the same upon the connection between the appellee and appellants at the power-house.

The testimony of every witness in the case is to the effect that the wattmeter is the proper instrument to record actual electric horse-power.

The answer of appellants to this is that the actual power derived from a circuit is dependent upon conditions existing in the machine of the consumer which are not within the control of the producer, and therefore a producer may be made to deliver according to wattmeter readings of a wasteful consumer.

It is to be remembered, however, that there is not a scintilla of evidence indicating any unusual or wasteful practices on the part of the appellee. No finding was offered to that effect, and no criticism whatever has ever been made of appellee's apparatus. It was admitted that it was of the ordinary type used in mining operations for loads of 300 horse-power or less.

A wattmeter is a device which measures the actual mechanical force of the current at the place where the instrument is situated,—in this case, the panel at the Sheep Creek power-house.

We are not unmindful that it has been inferentially said herein that an attempt is being made to

measure the power at the point of consumption, but the decree expressly provides for this measurement at the power-house on the panel where the connection is made before any line losses or other extraordinary conditions whatsoever are encountered. (Tr. 346.)

All through appellants' brief the power factor is spoken of as an existing thing in and of itself. As a matter of fact, however, power factor is not a thing in being; it is simply the ratio of difference between a theory and a fact.

A wattmeter is built so as to test the actual dynamic power of the current.

For this reason, in order to avoid disputes as to the precise amount of power being delivered, the Court has ordered the installation of a wattmeter.

It is next contended that the Court should not have compelled appellants to install a time relay circuit-breaker, and it is dismally prophesied throughout the brief that in some unforeseen manner this may work a total wreck of appellants' entire generating plant, hoisting machinery, transmission lines, and operating motors.

In answer to this, suffice it to say, that within five feet of the place where the Court has ordered this time relay circuit-breaker to be installed on appellee's panel, appellants have now a similar instrument installed on their own. The same condition is shown by the record to exist in each of the other two power-houses of appellants; in fact, it is disclosed that the circuit in question is the only one leaving any of the

power-houses of appellants on which this device has not already been installed.

It does not appear that any particular damage has as yet been caused appellants by reason of these instruments, and it is not quite observed how the one in question could be calculated to operate differently from those already in use.

The time relay circuit-breaker is shown by the testimony to be the proper and usual instrument adopted to prevent disconnection of the circuit by reason of the surges attendant upon the starting of machinery.

A circuit-breaker is an instrument of protection to appellants, and in no sense necessary to appellees.

It is next gloomily predicted that under the decree appellees will so decrease the efficiency of their operating motors as to decrease the power factor to such an extent as to absorb, not only all the current generated at Sheep Creek plant, but in addition that developed at the other two power-houses.

We think it is sufficient in answer to this to say, first, that it is highly improbable that any such situation will ever arise; and secondly, if it did, appellants would secure ample protection from the court.

The decree in the case at bar by no means forecloses appellants from complaining hereafter of any improper practice upon the part of appellee, and in no sense permits appellee to change conditions to the detriment of plaintiff.

POINTS SUGGESTED AFTER THE ARGUMENT.

Before concluding this brief, we feel that two or three points should be touched upon, which were

developed in the argument of the case the day this brief was completed.

STARTING SURGE.

First—It was stated by counsel for appellants that the amount of starting surge which might be required of the appellants was unlimited, and that therefore the contract might as well call for 3,000 as well as 300 horse-power. This is answered by the fact that instead of asking for a wide open circuit, such as the appellants give to their other consumer, the Alaska-Juneau Company, the only request made of the Court was that the ordinary type of thirty-second inverse time relay circuit-breaker be installed.

The testimony shows that this is the usual practice on circuits leaving power-houses, and also shows that no more than 300 H. P. could be taken from such circuit-breaker, excepting for overloads lasting less than thirty seconds.

It is inconceivable that the appellants should try to persuade this Court that there is greater danger in serving the appellees than there is in serving themselves or their other customer, unless the appellees are using a different class and character of machinery, which is dangerous to the circuit. The testimony is to the contrary. Chief electrician of the appellants testified (Tr., page 413):

Q. "From the standpoint of danger, practical danger of the capacity to handle the situation, the load of 300 or 400 horse-power motor isn't an element from a practical standpoint."

A. "*Not a very big element.*"

Q. "And in speaking of a load, you understand I speak of it in the sense of a starting load."

A. "I understand."

THE SYNCHRONOUS MOTOR.

Second—It is claimed that the synchronous motor should be installed by the appellees. The chief electrician for the appellants testified (Tr., page 413):

Q. "Now, there has been a good deal said here about synchronous motors. How many synchronous motors installed on any of the mining plants in this vicinity that you know of?"

A. "So far as I know, no synchronous motors installed at the present moment."

(See, also, Tr., page 933, wherein appellants' witness, Carl E. Heise, general manager of the Westinghouse Electric Company (for the Pacific Coast) says—referring to cross-interrogatory No. 4:)

Q. "Where have you seen a synchronous motor in use upon a three-phase alternating current for a load of not to exceed 300 horse-power?

A. "I do not recall that I have ever seen a synchronous motor of such small capacity in commercial use."

(Tr., page 933.)

Further, where he says:

"I would state unquestionably that particularly in the smaller sizes, the induction motors predominate. Small synchronous motors are much more expensive than induction motors of a corresponding size, and induction motors are more simple and easy to operate."

WHAT IS THE DIFFERENCE BETWEEN A CURRENT OF THREE HUNDRED HORSE-POWER AND THREE HUNDRED HORSE-POWER?

Third—It was stated by counsel for appellants, in the argument in this case, that what they contracted to sell was *current* not power, and that therefore the system of measurement was different. It must logically follow, then, that a *current* of a certain horse-power means something entirely different than the *horse-power,* which defines the strength of the current, and that the words "300 horse-power," as a modifying and descriptive phrase in connection to the word "current," has an entirely different meaning than 300 horse-power alone. It seems to us to be a waste of time to attempt to answer such an argument.

THE VALUE OF SHEEP CREEK POWER.

Fourth—Statement was made by counsel for appellants, in the argument of this case, also that the contract appraised the value of appellees' rights—at the time the same was executed—at $25,000. From the testimony and from the contract itself it is perfectly apparent that $25,000 was not an appraisement of the value of appellee's rights, but merely an arbitrary figure fixed in case the appellee or its successors should dally along for nine and a half years without exercising their option to take the plant. At the outset of the negotiations Mr. Shackleford distinctly stated to Mr. Bradley (Tr., page 103):

"I informed him that I did not think he was prepared—from his offers—to pay a price that would be attractive to the owners of the property, and he finally outlined an agreement, which he called a * * * 'flood-water agreement.'"

Mr. Bradley's letter to Mr. Endicott shows clearly that it was never in the minds of the parties that the contract should eventuate in any other way, but that the option to take the horse-power would be exercised; that there was any difference in Mr. Bradley's mind at this time between actual horse-power and an intricate current of the same amount of horse-power is evident from the terms of the letter, for he speaks there undoubtedly of "actual horse-power" (Tr., page 108):

"Estimating conservatively 150 H.P. is all the power these mines required for their past operations."

He certainly could not have meant theoretical power, when he was in a position to know that the plant that he was about to purchase had a producing capacity of 300 H.P.

THERE IS NO EVIDENCE OF WASTE ON PART OF APPELLEES.

Fifth—During the argument counsel for the appellants also laid great stress upon the point that the circuit at the Perseverance Mine carried a very long transmission line, and stated that it was about four miles. This is the first time we have heard a four-mile transmission line referred to as a long transmission line and involving a low-power factor.

Testimony shows that the transmission lines of the appellants, performing their own service, are equally as long, and that the distance to the face of the Sheep Creek tunnel is very nearly as long. The Sheep Creek mines are at a very considerable distance from the place where their power plant is situated. Whether intentionally or not, counsel inferentially stated to the Court that the line losses on the appellee's circuit were charged against them, and that we were in fact measuring the power at the point of consumption instead of at the point of generation. The testimony shows the point of measurement is on the panel at the power-house of the appellants; that is where the Court ordered the installation of the wattmeter. With a wattmeter at that point it would register entirely different from a wattmeter at the point of consumption, and a wattmeter at the power-house would not measure any losses involved in transforming or transmission. (Tr., page 346.)

We consider that so far as the measurement of power was concerned, appellants lost their case irretrievably when it was discovered—during the examination of Mr. Proebstill (Tr., pages 387–388)—that they had actually ordered a wattmeter to measure the power on the appellee's circuit, but were concealing the fact.

The uncontradicted evidence of the case shows that a separate system of generation of 300 H.P. would serve the appellees as well and efficiently as if they were connected with the larger generator of appellants. In order to avoid this expense and un-

due inconvenience, the lower court has signed a decree allowing us the usual protection against breakage of circuits by ordering the installation of the relay breaker, and by ordering the measurement of the power in accordance with the method which the appellants first intended to give to the appellees, namely, by wattmeter.

IF THE CASE WERE REVERSED, IT WOULD ONLY BE TO DECREE THAT APPELLANTS SO CONSTRUCT THEIR PLANT AS TO GIVE A SEPARATE AND UNINTERRUPTED SERVICE OF THREE HUNDRED HORSE-POWER.

Sixth—If this case were to be reversed on the ground that starting surge could not be taken out of the larger generators of appellants, nothing could come to appellants from such a decision except a reversal, which would compel them to establish such a separate system of generation and connection as would place the appellees in *statu quo,* as they were at the time of the execution of the contract, and they would be compelled to go to the expense of installing of the separate generator, capable of producing 300 actual horse-power, so as to comply with their covenants to provide the appellees with an "uninterrupted current." This would be a useless and unnecessary expense, but, so far as service is concerned, would be just as satisfactory to appellees, and under such circumstances would dispel from imagination of appellants the "bogie" as to a power factor of a 300 H.P. current, and the starting surge of the same would ruin their system (which they say

they fear) of large producing plants by some unforeseen calamity.

If this property is to be divided up again, because of the petty differences which have arisen, the successors of the Endicotts are at least entitled to be furnished with enough of the waters of Sheep Creek to produce the amount of power which Mr. Bradley promised to furnish in his letter and telegram.

CONCLUSION.

In conclusion, we respectfully submit that appellee cannot but feel that it has received from appellants in this case treatment which was in no sense its due.

Its grantor, and immediate predecessor in interest, deeded to appellants extremely valuable water rights, mill sites, power sites, and other valuable property, reserving unto themselves only about 1-9th of the total power capable of being developed from Sheep Creek.

At a comparatively small cost in the erection of their power-plant, appellants are deriving an immense yearly benefit from the rights of the property acquired under the contract.

Starting in to comply with its terms, they suddenly, and without warning, begin, not only the breach of both its letter and spirit, but seek to harass appellee with petty annoyances, compelling appellee to wait from three to nine hours for the restoration of the current at each outgoing of the circuit-breaker and denying appellee even the opportunity of measuring its own current pending the dispute.

The record does not disclose the motive which

prompts this apparently studied system of attack; not withstanding the knowledge upon the part of appellants as to the irreparable nature of the damage thereby ensuing.

Except for the protecting arm of the equity side of the court in reaching out and compelling appellants *pendente lite* to hold in their circuit-breakers and permit the starting of appellee's machinery, appellants might have been successful in their apparent plan and compelled the temporary abandonment, at least, of one of the largest and most laudable enterprises of development as yet begun in the territory.

We earnestly request the Court to continue this equitable protection, and submit that the decree herein rendered should in all respects be affirmed.

SHACKLEFORD & BAYLESS,
Attorneys for Appellee.

ALBERT FINK and
Z. R. CHENY,
Of Counsel.